Supreme Court, U.S.
FILED
NOV 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-633

APEX OIL COMPANY,
Petitioner,

v.

JOSEPH DIMAURO, *et al.*,
Respondents.

BRIEF OF THE BELCHER RESPONDENTS IN SUPPORT OF PETITION

MICHAEL LESCH
Counsel of Record

SHEA & GOULD
330 Madison Avenue
New York, New York 10017
(212) 370-8000

Attorneys for the Belcher Respondents

November 10, 1987

6 pp

TABLE OF AUTHORITIES

PAGE

Cases

Matsushita Electric Industrial Co., Ltd. v. *Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986) 2

Procunier v. *Navarette*, 434 U.S. 555 (1978) 3

United States v. *Mendenhall*, 446 U.S. 544 (1980) 3

Rules

Sup. Ct. R. 19.6 1

Sup. Ct. R. 21.1(a) 2

Sup. Ct. R. 28.1 1

Other Authorities

R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986) 3

In The
Supreme Court of the United States
OCTOBER TERM, 1987

No. 87-633

APEX OIL COMPANY,

Petitioner,

v.

JOSEPH DIMAURO, *et al.*,

Respondents.

BRIEF OF THE BELCHER RESPONDENTS IN SUPPORT OF PETITION

Pursuant to Rule 19.6, Respondents The Coastal Corporation, Coastal States Marketing, Inc., Belcher Oil Company, The Belcher Company of New York, Inc., Belcher New England Inc., and Belcher New Jersey, Inc. (hereinafter collectively, "Belcher" or the "Belcher Respondents")[1] submit this brief[2] in support of the petition of Apex Oil Company ("Apex") seeking review of a decision and judgment of the United States Court of Appeals for the Second Circuit (A 3-36).[3]

In Point II of its petition, Apex urges that the appropriate evidentiary standard by which to link a defendant to an antitrust conspiracy is "slight evidence"; that the court

[1] The disclosure required by Rule 28.1 is contained in Belcher's petition for a writ of certiorari pending before the Court (No. 87-631).

[2] Apex's petition was received on October 21, 1987. Accordingly, this brief is timely.

[3] References are to pages in Apex' appendix to its petition.

below misunderstood that standard; and, in all events, the court misapplied it. (Apex Pet., pp. 21-24).

In Belcher's separately filed petition for certiorari (No. 87-631), we also urged that the court below failed to apply the correct evidentiary standard for inferring membership in an antitrust conspiracy and, in particular, contested the applicability of the "slight evidence" standard in light of this Court's pronouncements in *Matsushita*[4] and the cases preceding it. As we argued in our petition:

> In its analysis of the Berberich notes—the crucial evidence linking Belcher to the Northeast-Global conspiracy—the Second Circuit made several errors reflecting its failure to apply the proper *Matsushita* analysis. *First,* the court noted that "once a conspiracy is shown, only 'slight evidence' is needed to link another defendant with it" (26a). By mandate of this Court, however, Apex, faced with defendants' denials, was required to come forward not with so-called "slight evidence", but rather with "significant probative evidence, which tends to exclude the possibility that the alleged conspirators acted independently." *Cities Service,* 391 U.S. at 277-88; *Modern Home Institute, Inc.* v. *Hartford Accident & Indemnity Co.,* 513 F.2d 102 (2d Cir. 1975); *Reborn Enterprises, Inc.* v. *Fine Child, Inc.,* 590 F. Supp. 1423 (S.D.N.Y. 1984), *aff'd,* 754 F.2d 1072 (2d Cir. 1985). The Second Circuit thus relied on an inapplicable standard, and impermissibly bootstrapped its finding of a Global-Northeast conspiracy into an inference of Belcher's participation.

Belcher Pet., pp. 14-15.

Rule 21.1(a) of this Court provides:

> "The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein."

---

[4] *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corp.,* 475 U.S. 574, 106 S. Ct. 1348 (1986).

"[W]hen resolution of a 'question of law is a 'predicate to intelligent resolution' of the question on which we granted certiorari,' it can be regarded as 'fairly comprised within it.' *Vance* v. *Terrazas,* 444 U.S. 252, 258-59 n.5 (1980); *Cuyler* v. *Sullivan,* 446 U.S. 335, 342-43 (1980)." R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 361 (6th ed. 1986). Indeed, questions not explicitly mentioned but "essential to analysis" of the decisions below or "to the correct disposition of the other issues" have been treated as "subsidiary issues 'fairly comprised' by the question presented." *Procunier* v. *Navarette,* 434 U.S. 555, 559-60 n.6 (1978); *United States* v. *Mendenhall,* 446 U.S. 544, 551-532 n.5 (1980). Since the second question presented by Apex (Apex Pet., p. "i") fairly comprises within it the very questions which Belcher has asked this Court to review (Belcher Pet., p. "i"), we support the granting of Apex' petition for certiorari. For the reasons set forth in our petition (No. 87-631), we believe that the appropriate evidentiary standard for inferring membership in an antitrust conspiracy is a matter now appropriate for review by this Court.

CONCLUSION

For the foregoing reasons, the Belcher respondents pray that the Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit, upon the second question set forth in Apex' petition (No. 87-633) and the questions set forth in Belcher's petition (No. 87-631).

November 10, 1987

Respectively submitted,

MICHAEL LESCH
Counsel of Record

Adam B. Gilbert
Karen S. Frieman
SHEA & GOULD
330 Madison Avenue
New York, New York 10017
(212) 370-8000

Attorneys for the
Belcher Respondents